

Supplemental Pension Plans

*The role  
and responsibility*  
of a pension committee



Québec 

## **Acknowledgements**

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This publication does not have force of law. In cases of conflicting interpretation, the *Supplemental Pension Plans Act* and its regulations prevail over the contents of this publication.

This document is also available for downloading on the Web site of the Régie des rentes du Québec ([www.rrq.gouv.qc.ca](http://www.rrq.gouv.qc.ca)).

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# *The role and responsibility* of a pension committee

A pension committee is the administrator of a pension plan. It is an important role that requires its members to have a thorough knowledge of the committee's obligations and responsibilities.

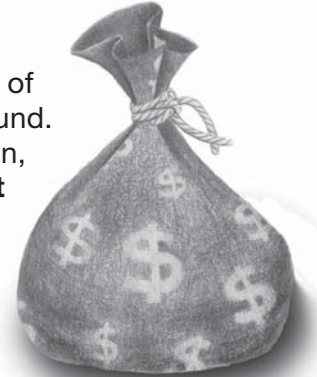
To administer a plan well, it is important for the pension committee to adopt operating rules based on sound management principles. Instalment 1 introduced six of the principles and explained how to implement them. The first principle states that each member must have a clear understanding of the committee's role and responsibility. This is an essential element to ensure sound administration of a plan.

This instalment discusses the fundamental principles of the role, duties and responsibility of a pension committee and its members. It also discusses the committee's obligations when it transfers duties to associates, the liability of its members and ways to reduce the risk of lawsuits.

We will see that a thorough understanding of the committee's duties and the implementation of a minimum number of rules will ensure that the committee acts judiciously in carrying out its responsibilities.

## 1. The role of the pension committee

In a pension plan, the contributions of the employer and those of plan members (if they pay contributions) are put into a pension fund. Although this fund is used to pay out benefits set forth in the plan, it does not belong to the employer or the members:<sup>1</sup> it is a **trust fund**. The pension committee that administers the pension fund is the **trustee**.<sup>2</sup> It assumes the duties of an administrator of the property of others. The provisions of the *Civil Code* that apply to persons who are charged with the administration of property that is not their own are indicated at the end of this instalment.



The role of a pension committee is to ensure the daily financial and administrative operations of the pension plan by implementing **adequate means** to protect the benefits of the plan's members and to conserve and enhance pension fund assets. Its role is similar to that of a corporate board of directors and is distinct from the role of the employer,<sup>3</sup> who decides to establish a pension plan, to amend it and to terminate it.

To fulfill its mission, the pension committee must ensure that a number of duties are carried out, including the following:<sup>4</sup>



- membership of eligible employees in the plan;
- payment of contributions to the pension fund;
- forwarding of information to members of the plan, as prescribed by law (such as an annual statement of benefits and a pension plan summary);
- calling and holding of an annual meeting;
- payment of benefits set forth in the plan;
- setting up and implementing an investment policy;
- selection of associates;
- supervision of the work of associates;
- reporting required information to the Régie des rentes du Québec and the Canada Revenue Agency.

The pension committee must implement the procedures necessary to ensure that these duties are adequately carried out and adopt by-laws to ensure that the committee meets its obligations.<sup>5</sup>

<sup>1</sup> In this instalment, the term “*member*” includes active members, retirees and beneficiaries.

<sup>2</sup> *Supplemental Pension Plans Act*, section 150. In pension plans that have less than 26 members, the employer can serve as the pension committee.

<sup>3</sup> In some cases, it is the union or employer and union who hold these powers.

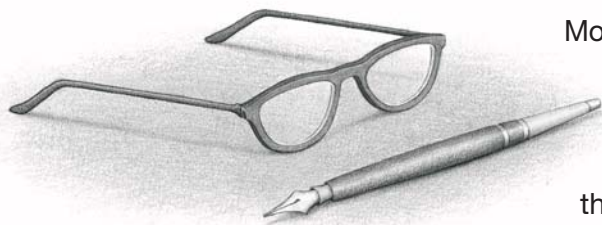
<sup>4</sup> A detailed list of the financial and administrative duties of the pension committee can be found in the booklet *Guide for Pension Committee Members*, published by the Régie des rentes du Québec.

<sup>5</sup> Instalment 3 outlines the operating rules of the pension committee.

As the plan's administrator, the pension committee must operate in compliance with legal requirements and also see to it that pension plan provisions are enforced. If some provisions are unclear, the committee must interpret them, ask for the necessary opinions to validate their application and, where necessary, recommend changes to the plan. The committee may also make recommendations to correct any shortcomings it notes in the administration of the plan.

## 2. The duties of the pension committee

Like any person who administers the property of others, the pension committee has the legal obligation to exercise the prudence, diligence and skill that a reasonable individual would exercise in similar circumstances. It must act with honesty and loyalty, in the best interest of plan members.



More specifically, this means that to manage the pension plan, the **pension committee** must comply with the requirements of the *Supplemental Pension Plans Act* (SPP Act), and where necessary, transfer duties to other individuals and monitor the fulfillment of these duties.

**Committee members** who have acquired a relevant knowledge or skill because of their profession or business, must use this knowledge or skill in administering the plan. All committee members must avoid conflicts of interest.

### 2.1 Transferring functions

Since the tasks are numerous and sometimes complex, the committee can transfer functions to other individuals, but must ensure that the duties are correctly carried out. Individuals who have a particular knowledge essential to the operation of the committee (such as an accountant, actuary, securities custodian, investment advisor, or the employer who is part of the plan) are called **administrative associates**.<sup>6</sup>

*Important!*

*Only the pension committee can designate an associate to carry out committee duties. One or more members may designate an associate, so long as they are authorized to do so by the committee.*

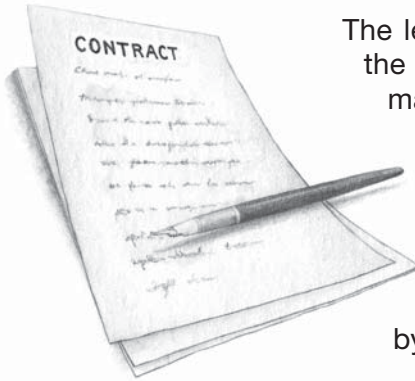
When an associate is designated to carry out a function, the committee must ensure that the individual has the necessary skills and must monitor the associate's work. The committee must therefore implement and enforce procedures for selecting associates and supervising their work. For example, if there is a call for tenders, detailing the selection criteria will be important.



<sup>6</sup> Instalment 4 discusses administrative associates.



## 2.2 Choose the type of contract



The legal responsibility of the pension committee depends on the type of contract that ties it to the associate. This contract may be a mandate, a service contract or a delegation.

Some duties that must be fulfilled in the course of administering the plan are not duties of the pension committee. For work that must be done entirely by certain professionals, the committee must enter into service contracts. Such work cannot be carried out by means of a mandate or a delegation.

### 2.2.1 Mandate and service contract

A **mandate** is a written or verbal contract by which the pension committee grants authority to one individual to represent the committee to fulfill one or more of its duties. This individual is deemed a **mandatary**. The mandatary carries out duties on behalf of the committee. The mandatary represents the pension committee before a third party (members, another individual or a government agency). The committee is responsible to a third party for the acts or omissions of a mandatary who acts within the confines of his or her terms of reference.

A mandate can be given for the purpose of fulfilling a specific task or to generally oversee all of the pension committee's business. It is therefore possible to mandate the employer or another individual to fulfill the majority of the committee's duties. For example, it is common to mandate the employer to answer the questions of members, to sign up workers who are eligible for the plan, to issue statements of benefits, etc.

It is also common to give mandates to suppliers of professional services to fulfill the obligations of the pension committee. This may include answering the questions of members, preparing and issuing statements of benefits, registering amendments to the plan with government authorities, drafting an investment policy, etc.

The mandate should be written in clear terms to ensure that all of the parties clearly understand the scope of the mandate and that the mandatary is authorized to take actions that only the pension committee, as the administrator of the property of others, has the power to take. Therefore, if the committee instructs an individual to make speculative investments, this power should be clearly specified in the contract.

The committee is required to cooperate with a mandatary. It must provide him or her with the information required to fulfil the mandate. The mandate must clearly indicate the respective obligations of each party.

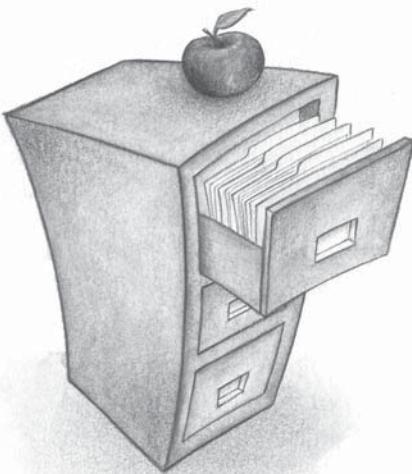
A **service contract** is usually a written contract by which the committee hires an individual to perform a specific activity. Unlike a mandatary, a **service provider** does not act on behalf of the pension committee. He or she does not represent the committee before a third party. A service provider does not usually interact with anyone outside the committee.

As indicated above, activities that are restricted to certain professions are carried out by means of a professional service contract. This is particularly true in the case of the financial statements of the pension fund, which must be audited by an accountant, the actuarial valuation for a defined benefit pension plan, which must be performed by an actuary or a legal opinion, which may be given only by a legal expert.

Service contracts may also be signed for the purpose of fulfilling some duties of the committee. For example, it is not uncommon to hire consulting firms to prepare statements of benefits, without the need for a mandate or a delegation of power.

The service contract must clearly define the obligations of each party. The committee remains responsible for the actions or omissions of a mandatary or a service provider that occur in the course of fulfilling their duties. The committee may, however, seek recourse against a mandatary or service provider who fails to fulfil his or her obligations. **Hence, the importance of written contracts!**

### ***Where the committee transfers duties, it must:***



- Choose a mandatary or service provider carefully. To do so, the committee must take reasonable measures to assess a person's ability to fulfill the requirements of the contract. For example, it should check the individual's professional credentials and require references.
- Provide the mandatary or service provider with clear and specific instructions, preferably in writing.
- Control and supervise the individual's work, to the extent required by the circumstances.
- Conserve written documents that reflect efforts made to implement each instruction listed above.<sup>7</sup>

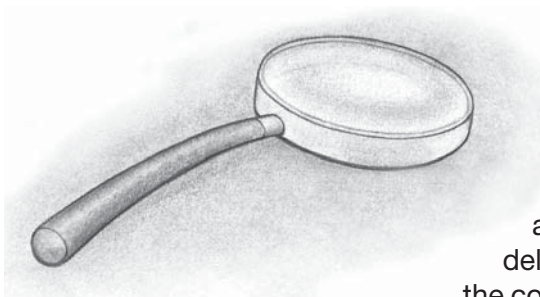
<sup>7</sup> Instalment 3 discusses the obligation to document decisions and to conserve written documents.

### 2.2.2 Delegation

There is **delegation** where the pension committee transfers duties, in writing, to an individual who agrees to assume the same obligations and incur the same liability as the pension committee. A delegation must be made in writing in clear terms and the committee must have the right to revoke it at anytime.

An individual to whom duties have been delegated, the **delegatee**, therefore acts on his own behalf. Delegation results in a “transfer” of liability from the committee to the delegatee.

As administrator of the pension plan, the committee must nonetheless supervise the work of the delegatee to ensure that he or she adequately fulfills the responsibilities delegated. The committee can therefore demand that the delegatee provide an account of his or her work by submitting periodic reports.



A delegatee may in turn delegate all or part of his or her duties if the delegation agreement so authorizes. A delegatee’s obligations are therefore transferred to a subdelegatee. Therefore, if the committee chooses a delegatee for his particular skills, such as relevant knowledge, the committee must ensure that the delegation agreement does not authorize subdelegation.

The pension committee should regularly review the delegations that are in effect. During a review, all members have a say in the ability of delegates to fulfil their duties and to verify if the delegations that are in effect continue to be in compliance with the committee’s policy. This exercise enables the committee to decide whether a delegation should be maintained or revoked and to make any other changes or adjustments necessary.

It should be noted that under the *Supplemental Pension Plans Act*, the pension committee must, within 30 days after a member having the right to vote takes office, reexamine the delegations of powers. New members should also be informed about the mandates and service contracts in effect.

### *Important!*

*When a pension committee chooses to delegate duties, it must do so in writing and indicate in the contract that this is a delegation. It must also specify that the delegatee will assume the pension committee’s obligations and responsibilities when fulfilling the tasks delegated to him or her. If the contract does not specify that this is a delegation, the terms of the contract will serve to determine the intention of the parties, hence the importance of a clearly worded contract!*



**Where the committee delegates duties, it must:**

- Ensure that the plan text contains no provision that prohibits delegation of the duties in question.

If the plan prohibits delegation, any delegation will be null and void and committee members may be held responsible for any errors or omissions by the delegatee, as though the members had made these errors or omissions themselves.

- Take reasonable measures to assess the ability of the delegatee to successfully fulfill the terms of the contract. For example, the committee can check the individual's professional credentials and require references.
- Provide the delegatee with clear and specific instructions in writing.
- Supervise the individual's work to the extent required by the circumstances.
- Conserve written documents that reflect the steps taken to implement each of the foregoing obligations.

If these precautions are taken, in the event of an error or omission on the part of the delegatee, it is the delegatee who can be held responsible and not the committee. The pension committee nonetheless has the obligation to intervene as soon as it becomes aware of the delegatee's error or omission. Should the committee fail to intervene, it may be held liable for losses incurred. The pension committee must also intervene immediately if it learns that the delegatee is performing a duty that has not been delegated to him or her.



### 2.3 Avoid conflicts of interest

No member of a pension committee may exercise his powers in his or her own interest or in the interest of a third person nor place himself or herself in a situation of conflict between his or her personal interest and the duties of his or her office.



If a committee member is a plan member or beneficiary and regardless of whether he or she was appointed to the committee by the employer or by the plan members, he or she must exercise his or her powers in the common interest, considering his or her own interest to be the same as that of the other members of the plan.

A member of the pension committee has the duty to inform the pension committee, in writing and as soon as possible, of any situation in which he or she may not be able to give precedence to the interests of the plan, whether or not he or she would benefit financially from the situation. He or she must also notify the pension committee of any personal claim against the pension fund, such as an account receivable for services rendered prior to appointment as a pension committee member. It must be noted that the right to payment of pension benefits is not considered to be such a claim.

The committee must keep a register in which any situation that could involve a conflict of interest reported to it is listed. It must establish the procedures to be followed when a committee member is in an actual or potential conflict of interest situation. The member in question may continue to perform his or her duties on the committee, but must abstain from participating in making certain decisions.

### *Example*

*The committee issues a call for tenders to select an accountant to audit the financial statements of the pension fund. The brother-in-law of one of the committee members works for one of the accounting firms that are bidding on the contract. Since this member could be deemed to be in a conflict of interest, he or she must inform other committee members of the situation so that it can be recorded in a register. The member will be required to abstain from voting on the selection of the accountant.*

## Important!

Where the committee transfers duties to an individual, such as a delegatee, the contract must indicate that this individual is subject to the obligation to avoid potential conflicts of interest and that, should the case arise, the individual must notify the committee of such a situation.

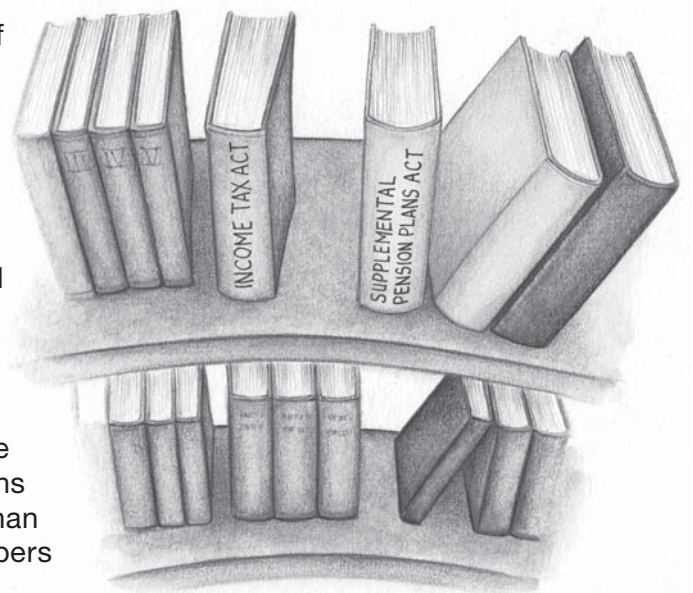
### 2.4 Compliance with legal requirements

The pension plan must be administered in compliance with requirements set forth in legislation, in particular the *Supplemental Pension Plans Act* and the *Taxation Act*.

Pension legislation contains a number of legal requirements that govern funding of the plan, managing the pension fund, benefits that can be paid, rights of members and information that must be submitted to the Régie des rentes du Québec and the Canada Revenue Agency. The committee has the obligation to ensure that all legal requirements are met.

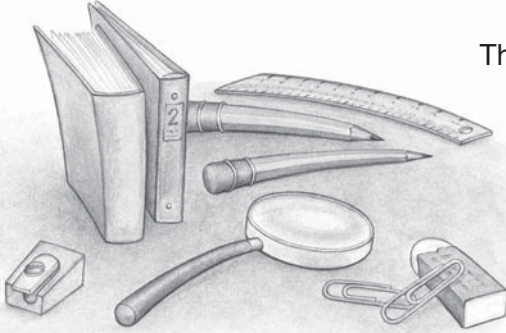
For example, the *Supplemental Pension Plans Act* prescribes that the committee is required to apply the provisions that are set forth in the *Act* if the plan text contains provisions that are less advantageous than the minimum rights granted to plan members under the *Act*.

Penalties or fines can be levied against the pension fund or an individual who fails to comply with statutory requirements. For example, if the annual information return is not submitted before the statutory deadline, the pension fund will be required to pay additional fees (penalties) to the Régie des rentes du Québec. The committee may be required to justify, before plan members and the employer, the additional fees levied.



### 3. Liability of the pension committee

The pension committee acts through its members, who are personally responsible for ensuring that the committee meets its obligations. Committee members can be prosecuted before civil courts and forced to pay damages.



The committee has an obligation of **diligence**, not results. Committee members therefore cannot be held liable in all situations that involve financial losses. The *Act* does not require the committee to obtain pre-determined results to fulfil its duties adequately. The committee does however have the obligation to take the necessary steps that a reasonable individual would take in similar circumstances, in particular:

- Obtain necessary information.
- Verify the credentials of individuals to whom it has transferred duties, provide them with clear instructions and exercise adequate supervision over their work.

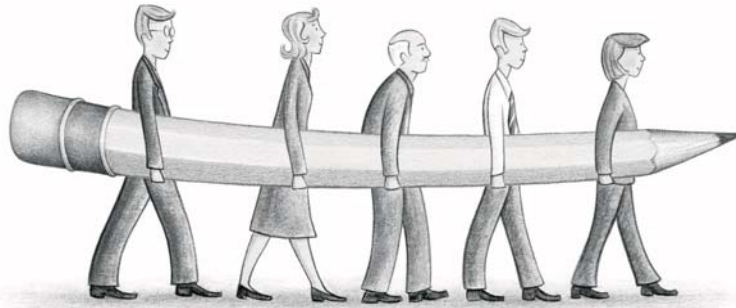
It is the responsibility of the individual who takes legal action to demonstrate that the pension committee or an individual to whom it transferred duties is in breach of his or her obligations and that damages have resulted.

## Example

*The committee has taken no measures to ensure that the annual information return has been filed within the time prescribed by law. This has caused a delay and consequently, massive additional fees are levied. Committee members may be held responsible for reimbursing such fees to the pension fund.*

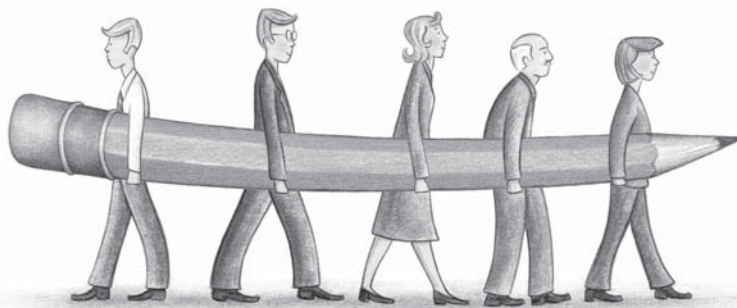
### 3.1 Pension committee members are jointly and severally responsible

The *Supplemental Pension Plans Act* provides that each committee member who has a voting right is deemed to have approved every decision made by the pension committee. A member is jointly and severally responsible for every decision unless he or she voices his or her opposition immediately.<sup>8</sup>



Joint and several responsibility means that a single member or any number of members can be sued or found liable for a breach of duty on the part of the pension committee or any committee member who has acted on behalf of the committee. A member or members who are sued have the right to recover, from each of the other members, reimbursement for the other members' share of the losses.

Joint and several responsibility also means that each committee member may be held singly responsible for the consequences of a committee decision. A committee member who does not want to be held responsible for a decision with which he or she disagrees, must immediately voice his or her opposition. Opposition cannot be expressed by abstention or by simply voting against the decision. It must be formal. A member who is in disagreement must therefore ensure that his or her opposition is noted in writing, in the minutes of the meeting. Should the member fail to voice his opposition at the time of the meeting and if the decision has not yet taken effect, he or she may voice opposition in a letter addressed to the committee, or put the matter on the agenda for the following meeting.



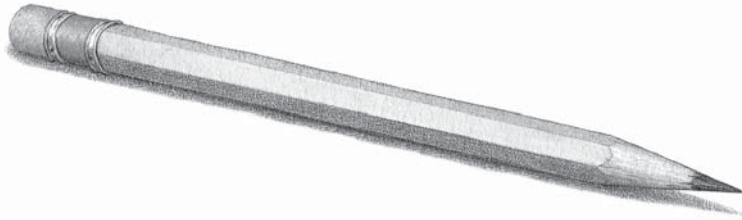
A member who is absent during a committee meeting is also deemed to have approved any decision made in his or her absence, unless notice of his opposition is sent in writing to the other members within a reasonable time after receiving news of the decision.

<sup>8</sup> *Supplemental Pension Plans Act*, section 156, subparagraph 1.



### 3.2 Resignation of a pension committee member

A pension committee member is allowed to resign. The resignation, however, does not discharge him or her of his responsibility as a committee member for decisions made during his mandate. Moreover, if a committee member resigns without a valid reason at a time when the committee or the pension plan is experiencing serious problems, the resigning administrator may be held liable for any pension fund losses incurred by reason of his or her resignation.



A member who resigns must give notice in writing to the individuals designated by the plan to appoint his replacement. If the plan makes no specific provisions, he or she must inform all the other committee members of his resignation. He or she must also notify the **Régie des rentes du Québec**. The resignation takes effect on the date notice is received, or at a later date specified in the notice.

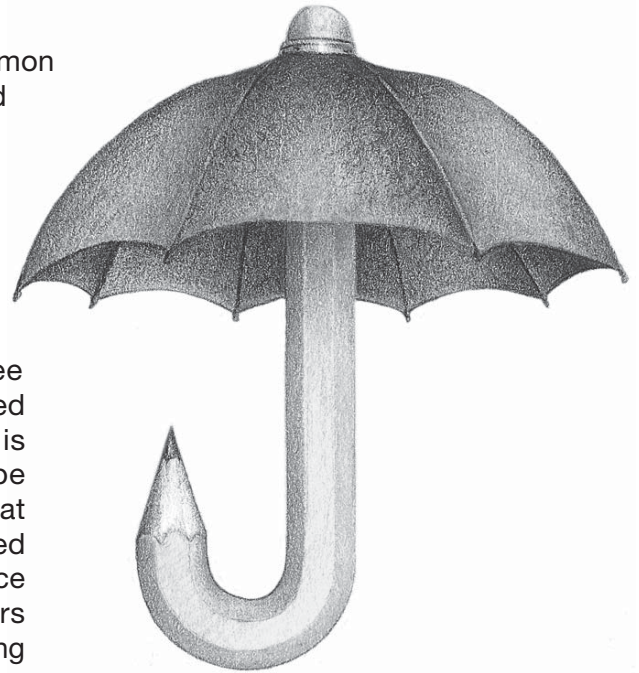
#### *Example*

*The employer has failed to pay employer contributions to the pension fund. Rather than take the necessary measures to obtain payment from the employer, committee members resign. If the resignations result in financial losses to the pension fund (no prospect of recovering unpaid employer contributions, costs for temporary administration, etc.), the resigning members may be required to pay damages.*

### 3.3 Lawsuit and personal liability insurance

The best way to prevent a lawsuit is to use common sense and to implement monitoring procedures and internal by-laws that ensure the thoroughness and transparency of the decision-making process. Furthermore, the best interest of plan members as a whole must motivate the actions of pension committee members at all times.

Although lawsuits against pension committee members are rare, the risk cannot be dismissed entirely. Furthermore, even where a lawsuit is unsubstantiated, defence costs alone can be high. For this reason, it is strongly advised that personal liability insurance coverage be provided for pension fund **trustees**. This type of insurance coverage protects pension committee members against acts, errors or omissions committed during the performance of their duties.



The cost of insurance premiums is considered a pension plan administrative expense which may be covered by the pension fund, unless the plan specifies that administrative fees are at the expense of another individual. The pension fund, however, cannot be used to pay any deductible amount or to compensate committee members in the event of a lawsuit for damages. Such a practice cannot be considered a safeguard to protect the interests of members, since the risk would therefore be assumed by the plan.

As indicated in section 3 regarding pension committee liability, its members cannot be held liable in all situations that involve financial losses. In some cases, the pension fund may be required to pay the defence expenses of members or the amount of a subsequent award for damages that does not stem from failure on the part of the committee to meet its obligations. It may involve, for example, a legal dispute on the interpretation of a provision of the plan regarding a benefit for which the committee had requested the necessary legal opinions. In all lawsuits, there will be a need to review the events in question and the terms of the insurance contract to determine the individuals who are liable.

Agreements may be made with the employer to pay the deductible amount or to compensate members, under certain conditions. Under some plans, members are protected by the employer's liability insurance, also known as "directors' and officers' liability insurance". This type of insurance coverage generally provides protection against administrative errors and omissions. It does not cover trustee risk. This protection can also be withdrawn in the event of financial distress or bankruptcy on the part of the employer. This is why it is best to purchase liability insurance that applies specifically to pension committee members.



Before choosing insurance coverage, it is important to compare the cost of the different components and actions that are covered, which vary from one insurer to another. The following elements should be considered:

- **the amount of the premium:**  
the amount that the underwriter of an insurance contract must pay the insurer periodically or at the beginning of the contract, in exchange for taking on a risk; the premium is the cost of insurance;
- **the deductible amount:**  
the amount of a covered loss (fixed amount or percentage) that the insured must pay in the settlement of a claim;
- **the terms of payment of defence expenses:**  
for example, these fees are disbursed before a judgment is rendered;
- **an out-of-court settlement;**
- **the individuals insured:**  
current, past or future members, mandataries, delegates, suppliers;
- **coverage at the end of a committee member's term of office:**  
particularly in a case of resignation;
- **the acts covered;**
- **exclusions.**

Insurance policies that cover trustee risk are often complex. Pension committee members should not hesitate to meet with an insurance representative to obtain clarifications.

## *Important!*

*Firm rules for sound administration of a plan (also called governance by-laws) are an absolutely necessary component, which insurers take into account when assessing a pension committee's performance, following an application to obtain liability insurance coverage for pension plan trustees.*

## Conclusion

Administering a plan is a duty that requires good preparation on the part of members and effective tools to ensure that the committee adequately fulfils its role. As we have seen in this instalment, administration of a plan is based on the common sense the committee must use in the performance of its duties and on the implementation of a minimum number of internal rules that foster sound administration of the plan.

Using common sense without internal rules to validate a situation can be risky. Having rules and a lack of common sense can be just as risky. Rules cannot accommodate all of the situations a pension committee may face. Hence the importance for committee members to have a clear understanding of their role and to become actively involved in plan administration. Thus they will be able to act appropriately according to the circumstances.

The instalments that follow will recommend procedures and internal operating rules a committee should adopt to ensure that it meets its obligations.

Sections 1260 to 1298 and 1299 to 1370 of the *Civil Code* prescribe the rules that apply to trusts and to an administrator of the property of others. Sections 2098 to 2129 and 2130 to 2185 also set forth the general rules that apply to a service contract and mandate.

These rules generally apply to the administration of a pension plan, unless the *Supplemental Pension Plans Act* has provisions for specific obligations, such as those set forth in sections 147 to 193 or unless the plan text or contracts with associates of the plan administrator contain special provisions that must be upheld.

For additional information on the interpretation of legal requirements, we suggest that you seek professional advice.